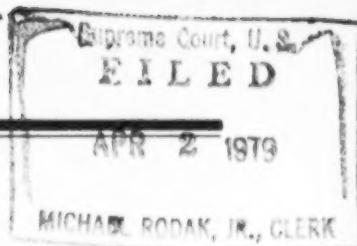


78-1339



IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. A-702

ROBERT L. TAYLOR,
Petitioner,

v.

NASHVILLE BANNER PUBLISHING COMPANY,
Respondent.

BRIEF OF RESPONDENT
In Opposition to Petition for Writ of Certiorari

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	3
Statement of the Case	4
Summary of Argument	6
Argument	9
Conclusion	37
Appendix A	A-1
Appendix B	A-28

Citations

Cases

American Railway Express Co. v. Levee, 263 U.S. 19, 20, 21 (1923)	6, 9, 10
Black v. Nashville Banner Pub. Co., 24 Tenn. App. 137, 141 S.W.2d 908 (1940)	32
Bon Air Hotel, Inc. v. Time, Inc., 426 F.2d 858 (5th Cir. 1970)	6, 12, 16
Brown v. Newman, 224 Tenn. 297, 454 S.W.2d 120 (Tenn. 1970)	7, 32
Cerrito v. Time, Inc., 302 F. Supp. 1071 (N.D. Calif. 1969)	12

Degrafenreid v. Nashville Ry. and Light Co., 162 Tenn.	
558, 39 S.W.2d 274 (1931)	34, 35
Garrison v. Louisiana, 379 U.S. 64 (1964)	15
Gertz v. Welch, 418 U.S. 323 (1974)	15
Greenbelt Coop. Pub. Asso. v. Bresler, 398 U.S. 6 (1970)	11
Henry v. Collins, 380 U.S. 356 (1965)	15
Hurley v. Northwest Publications, Inc., 273 F. Supp. 967 (D. Minn. 1967)	17
Hurley v. Northwest Publications, Inc., 398 F.2d 346 (8th Cir. 1968)	13
Johnston v. Cincinnati, N.O. & P.P. Ry. Co., et al., 146 Tenn. 135, 240 S.W. 429 (1922)	34
Michigan-Wisconsin Pipeline Co. v. Calvert, 347 U.S. 157, 160 (1954)	9
Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971) ..	6, 13, 14, 15
Nashville and American Trust Co. v. Aetna Cas. and Sur. Co., 21 Tenn. App. 366, 110 S.W.2d 1041 (1937) ...	7, 34
New York Times v. Sullivan, 376 U.S. 254 (1964) ..	6, 13, 14, 15
Roesnbloom v. Metro Media, 403 U.S. 29 (1971) ...	10-11, 15
St. Amant v. Thompson, 390 U.S. 727 (1968)	7, 15, 16
Thompson v. Evening Star Newspaper Co., 394 F.2d 774 (D.C. Cir.), cert. denied, 393 U.S. 884 (1968) ...	11, 13, 16
Time, Inc. v. Hill, 385 U.S. 374 (1967)	36
Time, Inc. v. McLaney, 406 F.2d 565 (5th Cir.), cert. denied, 395 U.S. 922 (1969)	12-13, 15
Treutler v. Meredith Corp., 455 F.2d 255 (8th Cir. 1972) ..	6, 16
United Medical Laboratories, Inc. v. Columbia Broad- casting System, Inc., 404 F.2d 706 (9th Cir. 1968), cert. denied, 394 U.S. 921 (1969)	13

Walker v. Pulitzer Pub. Co., 394 F.2d 800 (8th Cir. 1968) ..	13
Washington Post Co. v. Keogh, 365 F.2d 965 (D.C. Cir. 1966), cert. denied, 385 U.S. 1011 (1967)	12, 25
Wasserman v. Time, Inc., 424 F.2d 920 (D.C. Cir., cert. denied, 398 U.S. 940 (1970)	16
Williams v. McKee, 98 Tenn. 139, 38 S.W. 730 (1897) ..	32

Constitutions, Statutes and Rules:

United States Constitution:	
Amendment I	3, 6, 11, 12
Amendment XIV	3, 11
28 U.S.C. §1257(3)	2, 3, 6, 9
Tenn. Code Ann. 27-819	3, 5, 9
Tennessee Rules of Civil Procedure:	
Rule 56.05	16, 25

Miscellaneous:

W. Prosser, <i>The Law of Torts</i> , 4th Ed., §128 (1971) ...	8, 36
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BRIEF OF RESPONDENT
In Opposition to Petition for Writ of Certiorari

The respondent, Nashville Banner Publishing Company, files this brief in opposition to the petition for a writ of certiorari to review the judgment of the Supreme Court of Tennessee entered on November 6, 1978.

OPINIONS BELOW

The opinion of the Tennessee Court of Appeals (App. A, infra, pp. A-1-A-27) is reported at 573 S.W.2d 474. The text of the order of the Tennessee Supreme Court (App. B, infra,

p. A-28) entered on November 6, 1978, denying petitioner's Petition for Certiorari to review the decision of the Tennessee Court of Appeals was not reported.

JURISDICTION

Petitioner has invoked the jurisdiction of this Court under 28 U.S.C. § 1257(3). Respondent contends that this Court lacks jurisdiction over the subject matter, since petitioner has sought a writ of certiorari to review the judgment of the Tennessee Supreme Court denying petitioner's Petition for a Writ of Certiorari to review the decision of the Tennessee Court of Appeals. This Court only has jurisdiction to review decisions by the highest court of the state in which a decision could be had, and that decision was the decision of the Tennessee Court of Appeals.

QUESTIONS PRESENTED

Whether this Court has jurisdiction under 28 U.S.C. § 1257 (3) to review the judgment of the Supreme Court of Tennessee denying petitioner's Petition for Certiorari to review the judgment of the Tennessee Court of Appeals, where the Tennessee Court of Appeals is the highest court of the state in which a decision could be had.

Whether the Tennessee Court of Appeals erred in affirming the trial court's award of summary judgment to the respondent on the grounds that there was no genuine issue as to any material fact and that respondent was entitled to judgment as a matter of law on the issue of actual malice.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment of the United States Constitution provides in part:

Congress shall make no law . . . abridging the Freedom of Speech, or of the Press . . .

The Fourteenth Amendment of the United States Constitution provides in part:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law . . .

28 U.S.C. § 1257(3) provides:

Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

Tenn. Code Ann. § 27-819 provides:

Review of Court of Appeals by Supreme Court.—The Supreme Court, or any judge thereof, shall have the right to require, by certiorari, the removal to that Court for

review of any case that has been finally determined in the Court of Appeals, upon a petition for this purpose filed in the Supreme Court, which petition shall state the substance of the case to be decided, and shall be accompanied by assignments of error and brief in conformity with such rules as the Supreme Court may prescribe; and there shall be no other method of review.

STATEMENT OF THE CASE

This is a libel action filed on May 27, 1975, almost a full year after the articles which are the subject of this action were published by The Nashville Banner on May 30 and May 31, 1974. The two articles concerned political maneuvering by petitioner to obtain a seat on the Tennessee Supreme Court and an alleged approach by other individuals on behalf of petitioner to a member of the Tennessee Democratic Executive Committee to ask her "how much financing it would take to get her vote." The subject matter of the articles is of vital public or general concern and is clearly entitled to constitutional protection. At the time of publication, petitioner was a well known public figure in Tennessee and was a candidate actively seeking nomination to the Tennessee Supreme Court.

Petitioner charged in his complaint that both of the articles charged him with the crime of bribery. Respondent moved for summary judgment on two grounds; first, as a matter of law the articles were not defamatory of petitioner and second, as a matter of law there was no genuine issue as to any material fact on the issue of "actual malice."

The motion for summary judgment was pending in the trial court for over a year, and the trial court allowed every indulgence to the petitioner including amendments to the complaint and additional time to conduct further discovery and submit

final briefs. (R. 153) The record was fully developed and both sides had ample opportunity to submit affidavits, depositions and legal memoranda in support of their respective positions.

On January 5, 1977, the trial court filed an extensive memorandum opinion sustaining respondent's motion for summary judgment. (R. 129-153) The trial court held as a matter of law that the language in the articles was clear and unambiguous, that it certainly did not charge petitioner with the crime of bribery, and that the articles were not defamatory of petitioner. The trial court further held that the record reflected *absolutely no evidence* that the statements made by the respondent were calculated falsehoods or were made with reckless disregard for their truth or falsity.

The Tennessee Court of Appeals affirmed the trial court's granting of respondent's motion for summary judgment as to both articles published on May 30 and May 31, 1974, respectively. As to the May 30 article, the Tennessee Court of Appeals held that respondent's publication was protected by a constitutional privilege due to the absence of competent evidence that the article was published with "actual malice." Since the Tennessee Court of Appeals found that the May 30 article was published by respondent without actual malice, it did not reach a conclusion on the issue of whether that article was defamatory of petitioner. As to the May 31 article, the Tennessee Court of Appeals affirmed the decision of the trial court and held that respondent's publication of that article was constitutionally protected as a matter of law because of the absence of any issue of material fact with respect to actual malice. The Tennessee Court of Appeals further held as to the May 31 article that it could not be construed as a defamation of petitioner. The Tennessee Supreme Court declined to exercise its discretionary jurisdiction under T.C.A. §27-819 to review the decision of the Tennessee Court of Appeals and denied petitioner's petition for certiorari to review the decision of the Court of Appeals.

SUMMARY OF ARGUMENT

The order of the Tennessee Supreme Court denying certiorari to review the decision of the Tennessee Court of Appeals is not the judgment which is reviewable under 28 U.S.C. §1257(3). When the Tennessee Supreme Court declined to exercise its authority to review the decision of the Tennessee Court of Appeals, the judgment of the Tennessee Court of Appeals rather than the order of refusal by the Tennessee Supreme Court is the judgment properly reviewable under 28 U.S.C. §1257(3). *See American Railway Express Co. v. Levee*, 263 U.S. 19, 20-21 (1923).

The Tennessee Court of Appeals correctly affirmed the trial court's granting of summary judgment to the respondent, since the publication of both articles was protected by constitutional privilege and there was no genuine issue of material fact on the issue of actual malice. Petitioner was clearly a "public figure" under the applicable decisions of this Court. As a candidate for a seat on the Tennessee Supreme Court, the rule of *New York Times v. Sullivan*, 376 U.S. 254 (1964) was applicable. *See Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971). The trial court in the instant case found no material discrepancies in the voluminous depositions and affidavits filed in this cause. (R. 144) None of petitioner's proofs considered either singly or cumulatively, satisfies the constitutional standard with the convincing clarity necessary to raise a jury question as to whether the alleged defamatory falsehoods were published with knowledge that they were false or with reckless disregard of whether they were false or not. Since First Amendment considerations are involved in defamation actions such as the case at bar, summary judgment procedures are particularly appropriate. *See Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858, 865 (5th Cir. 1970) and *Treutler v. Meredith Corp.*, 455 F.2d 855 (8th Cir. 1972).

In order to demonstrate actual malice and to show reckless disregard for truth or falsity, there must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. *See St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). In the instant case, petitioner introduced no such evidence.

The Tennessee Court of Appeals correctly held as a matter of law that the article of May 31, 1974, was not defamatory of petitioner. Petitioner charged that both of the articles charged him with the crime of bribery. The statements claimed to be defamatory by petitioner when read in the sense that the readers to whom the article was addressed would understand it, simply does not amount to a charge of bribery. (R. 152) Where the language complained of is clearly unambiguous, its meaning and character presents a question of law for the Court. *See Brown v. Newman*, 224 Tenn. 197, 457 S.W.2d 120, 122 (1970). Respondent submits that the trial court correctly decided as a matter of law that the clear and unambiguous language contained in both articles was not capable of being interpreted as defamatory toward petitioner.

The Tennessee Court of Appeals did not weigh the evidence or judge the credibility of witnesses in holding that there was no genuine issue of material fact on the issue of actual malice. In viewing the inconsistent depositions of Will Cheek, the Tennessee Court of Appeals noted the rule in Tennessee that contradictory statements of a witness in connection with the same fact had the result of canceling each other out. Unexplained, conflicting statements of a witness nullify each other, and are entitled to no weight as evidence unless corroborated. *Nashville & American Trust Co. v. Aetna Casualty & Surety Co.*, 21 Tenn. App. 366, 110 S.W.2d 1041, 1046 (1937).

The Tennessee Court of Appeals noted that the inconsistency in Will Cheek's testimony was explained by his refreshed recol-

lection and further noted that Cheek's testimony in his second deposition was corroborated, while the testimony of his first deposition was uncorroborated. Disregarding the inconsistent testimony of Mr. Cheek was to view the evidence in a light as favorable to petitioner as that required by the summary judgment standard and perhaps more so.

The Tennessee Court of Appeals correctly affirmed the trial court's granting of summary judgment for respondent on the cause of action for intentional interference with prospective advantage which petitioner sought to plead by way of amendments to his original complaint. Petitioner sought by way of amendments to plead a tort which appears to be intentional interference with prospective advantage, or, more specifically, the tort of injurious falsehood which is merely a species of intentional interference with prospective advantage. The Tennessee Court of Appeals correctly observed that petitioner presented no evidence to raise an issue of material fact on any of the elements of that tort in the instant case. Further, the Tennessee Court of Appeals noted that petitioner had cited no authority in support of that cause of action or even to show that such a tort is recognized in Tennessee.

The Tennessee Court of Appeals agreed with the trial court that the First Amendment not only protects respondent against a charge of libel in this case, but it also protects respondent against liability for this tort. In general, it may be said that injurious falsehood, which is a tort that never has been greatly favored by the law, is subject to all of the privileges recognized both in cases of personal defamation and in those other types of interference with economic advantage. W. Prosser, *The Law of Torts*, 4th Ed. § 128 (1971). No matter what legal garb petitioner sought to dress his complaint in, it was incumbent upon petitioner to prove actual malice with convincing clarity and he completely failed to do this.

ARGUMENT

I. This Court Lacks Jurisdiction Over the Subject Matter, Since Petitioner Has Sought Review in This Court of the Wrong State Court Determination, Thus Depriving This Court of Jurisdiction.

Petitioner has invoked the jurisdiction of this Court pursuant to the provisions of 28 U.S.C. § 1257(3), and has sought a writ of certiorari to review the judgment of the Supreme Court of Tennessee entered on November 6, 1978, wherein that Court denied petitioner's petition for certiorari to review the decision of the Tennessee Court of Appeals. Under the provisions of 28 U.S.C. § 1257(3), this Court may review only the determinations "by the highest court of a state in which a decision could be had." Under Tennessee law, the Tennessee Supreme Court is granted discretion pursuant to the provisions of T.C.A. § 27-819 to exercise jurisdiction to review the merits of decisions of the Tennessee Court of Appeals.

When the Tennessee Supreme Court entered its Order on November 6, 1978, and declined to exercise its jurisdiction to hear the merits of the case, the Tennessee Court of Appeals was shown to be the highest court of the state in which a decision could be had. *See American Railway Express Co. v. Levee*, 263 U.S. 19, 20, 21 (1923), *see also Michigan-Wisconsin Pipeline Co. v. Calvert*, 347 U.S. 157, 160 (1954).

In *American Railway Express Co. v. Levee*, *supra*, the defendant applied to the Supreme Court of Louisiana for a writ of certiorari, but the writ was "refused for the reason that the judgment is correct." The respondent urged that the writ of certiorari was incorrectly addressed to the Court of Appeal of the State of Louisiana rather than to the Louisiana Supreme Court. This Court held that the writ of certiorari would prop-

erly issue to review the decision of the Court of Appeal. In the *Calvert* case the appellants were uncertain whether the appeal to this Court was properly from the Court of Civil Appeals or from the Supreme Court of Texas. Hence, each appellant appealed from each of the Courts. This Court held that the appeals were properly from the Court of Civil Appeals relying upon the earlier case of *American Railway Express Co. v. Levee, supra*.

Accordingly, petitioner has deprived this Court of jurisdiction under the provisions of 28 U.S.C. § 1257 by failing to seek a determination of the proper court decision, the decision of the Tennessee Court of Appeals, that Court's decision being the decision by the highest court of the state in which a decision could be had.

II. The Tennessee Court of Appeals Correctly Affirmed the Trial Court's Granting of Summary Judgment to the Respondent and the Tennessee Court of Appeals Correctly Held That the Publication of Both Articles Was Protected by Constitutional Privilege as There Was No Genuine Issue of Material Fact on the Issue of Actual Malice.

This libel action was filed on May 27, 1975, almost a full year after the articles which are the subject of this action were published by The Nashville Banner on May 30 and May 31, 1974. The text of these two articles are set forth as an appendix to the opinion of the Tennessee Court of Appeals. (App. A, infra, A-18-A-25) The subject matter of the two articles generally concerned the election of candidates to the Tennessee Supreme Court and specifically the political campaign and political maneuvering of the petitioner as one of the candidates vying for election to that body.

Fundamentally, both of these articles concerned subject matter which is of vital public or general interest. *See Rosenbloom*

v. Metro Media, 403 U.S. 29, 44 (1971). The public plainly has a vital interest not only in the calibre of candidates for political office, but in the nature of the groups or factions supporting the candidates, and the quality of candidates' spokesmen and backers are appropriate considerations to be taken into account. *See Thompson v. Evening Star Newspaper Co.*, 394 F.2d 774, 776 (D.C. Cir.), cert. denied, 393 U.S. 884 (1968). Thus, the very subject matter of these news reports is one of particular First Amendment concern. *See Greenbelt Coop. Pub. Asso. v. Bresler*, 398 U.S. 6, 11 (1970). To permit infliction of financial liability upon respondent for publishing these two news articles would subvert the most fundamental meaning of a free press, protected by the First and Fourteenth Amendments. *See Greenbelt Coop. Pub. Asso. v. Bresler, supra* at 14.

While respondent believed that it was entitled to summary judgment on a number of grounds, including truth of the matters published, (R.74) respondent moved for summary judgment on two grounds, both of which were sustained by the trial court. Respondent's first ground for summary judgment was that the language in the articles was clear and unambiguous and that the trial court should find as a matter of law that the articles were not defamatory of petitioner. (R.26) The second ground of respondent's motion for summary judgment was that there was no genuine issue as to any material fact on the issue of "actual malice" and that the respondent was entitled to judgment as a matter of law.

The Tennessee Court of Appeals held that the publication of both articles was protected by constitutional privilege and that there was no genuine issue of material fact on the question of actual malice. The Tennessee Court of Appeals further held in regard to the May 31 article that it certainly could not be construed as a defamation of petitioner. The Tennessee Court of Appeals did not reach a conclusion on the issue of whether

the article of May 30 was defamatory of petitioner, since that court affirmed the decision of the trial court on the issue of actual malice.

In affirming the decision of the trial court awarding summary judgment to respondent, the Tennessee Court of Appeals did not have to weigh the evidence and determine the credibility of witnesses in reaching its decision, since the record was totally devoid of any competent evidence introduced by petitioner on the issue of "actual malice." The only real question before this Court is whether the Tennessee Court of Appeals in the instant case properly affirmed the decision of the trial court granting summary judgment to the respondent. Respondent respectfully submits that based upon the record that this was a proper case for awarding summary judgment, that the Tennessee Court of Appeals correctly decided this issue in accordance with the decisions of this Court, and that this case does not merit the granting of petitioner's petition for certiorari.

In the First Amendment area, summary procedures are even more essential. For the stake here, if harassment succeeds, is free debate. Unless persons, including newspapers, desiring to exercise their First Amendment rights are assured freedom from the harassment of lawsuits, they will tend to become self-censors. See *Washington Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966), cert. denied, 385 U.S. 1011 (1967). Summary judgment is an integral part of the constitutional protection afforded defendants in actions such as this. *Cerrito v. Time, Inc.*, 302 F. Supp. 1071, 1075 (N.D. Calif. 1969).

Numerous courts have found summary judgment for publishers proper, as in the instant case, where the record is devoid of genuine issues of fact as to whether the alleged defamatory statement was published with actual knowledge of its falsity or with a reckless disregard of whether it was true or false. See *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858, 865 (5th Cir. 1970). See also *Time, Inc. v. McLaney*, 406

F.2d 565 (5th Cir.), cert. denied, 395 U.S. 922 (1969); *United Medical Laboratories, Inc. v. Columbia Broadcasting System, Inc.*, 404 F.2d 706 (9th Cir. 1968), cert. denied, 394 U.S. 921 (1969); *Hurley v. Northwest Publications, Inc.*, 398 F.2d 346 (8th Cir. 1968); *Walker v. Pulitzer Pub. Co.*, 394 F.2d 800 (8th Cir. 1968); and *Thompson v. Evening Star News-paper Co.*, *supra*.

III. The Tennessee Court of Appeals Correctly Held That the Publication of Both Articles Was Protected by Constitutional Privilege and That There Was No Genuine Issue of Material Fact on the Issue of Actual Malice, Since Petitioner Completely and Utterly Failed to Set Forth Any Specific Facts to Show That This Would Be a Genuine Issue for Trial or to Satisfy the Constitutional Standard of Clear and Convincing Proof Required on This Issue.

As a candidate for one of the seats on the Tennessee Supreme Court, petitioner was clearly a "public figure" under the applicable decisions of this Court, and the rule of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) was applicable. Under the rule in *Times*, for petitioner to recover for alleged defamatory falsehoods herein, it was incumbent upon the petitioner to prove "actual malice" with convincing clarity. Petitioner must prove that the statements were made by respondent with actual knowledge that the statements were false or with reckless disregard for whether the statements were false or not.

The instant case is controlled by *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971). In *Roy*, three days before the Democratic Primary in New Hampshire, The Concord Monitor published a column discussing the forthcoming election. The column spoke of political maneuvering in the primary campaign, referred to the criminal records of several of the candidates, and characterized the plaintiff, who was one of the candidates

for the United States Senate, as "a former small-time boot-legger."

The trial court in *Roy* instructed the jury that the plaintiff, as a candidate for elective office, was a "public official." This Court in *Roy* remarked:

Given the later cases, it might be preferable to categorize a candidate as a "public figure," if for no other reason than to avoid straining the common meaning of words. But the question is of no importance so far as the standard of liability in this case is concerned, for it is abundantly clear that, whichever term is applied, publications concerning candidates must be accorded at least as much protection under the First and Fourteenth Amendments as those concerning occupants of public office. That *New York Times* itself was intended to apply to candidates, in spite of the use of the more restricted "public official" terminology, is readily apparent from that opinion's text and citations to case law.

Monitor Patriot Co. v. Roy, supra at 271.

The rule in *New York Times* indicates that plaintiffs have a special burden of proof concerning libel about public officials which "relate to official conduct." In the *Roy* case, this Court defined "official conduct" as it pertains to candidates for public office and held that a newspaper publisher will be protected by the *New York Times* rule when it publishes articles concerning "anything which might touch on an official's fitness for office." The Court then remarked that "official conduct" clearly has little applicability in the context of an election campaign. In *Roy* the Court held as a matter of constitutional law that a charge of criminal conduct, no matter how remote in time or place, can never be irrelevant to an official's or candidate's fitness for office for purposes of the "knowing falsehood or reck-

less disregard" rule of *New York Times v. Sullivan*. See *Monitor Patriot Co. v. Roy*, supra at 277.

The subject matter of the two articles, concerning political maneuvering by petitioner to obtain a seat on the Tennessee Supreme Court and an alleged approach to a member of the Democratic Executive Committee to ask her "how much financing it would take to get her vote" is clearly a matter of vital public or general concern which is entitled to constitutional protection. See *Rosenbloom v. Metro Media*, supra at 44. In addition, the two articles concerned discussions involving matters of important public concern and are therefore entitled to constitutional protection. See *Time, Inc. v. McLaney*, supra at 573.

Since petitioner is clearly a "public figure" under applicable law, and since these articles concern matters of vital public or general concern, petitioner may recover for alleged injury to his reputation only on clear and convincing proof that the alleged defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth. See *Gertz v. Welch*, 418 U.S. 323, 342 (1974). Mere negligence in publishing the alleged defamation without verification is insufficient to establish "actual malice." See *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). Actual ill will or intent to inflict harm is insufficient to prove "actual malice." See *Henry v. Collins*, 380 U.S. 356, 357 (1965). To establish actual malice the publisher must act with a "high degree of awareness of probable falsity." See *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964), and see also *St. Amant v. Thompson*, supra at 731. The showing of malice may not be presumed, but is a matter for proof by the plaintiff. See *New York Times Co. v. Sullivan*, supra at 284, and see also *Time, Inc. v. McLaney*, supra at 572. In order to demonstrate actual malice and to show reckless disregard for truth or falsity, there must be sufficient evidence to permit the conclusion that the defendant in fact

entertained serious doubts as to the truth of his publication. *See St. Amant v. Thompson, supra* at 731.

Actual malice is a constitutional issue to be decided initially by the trial judge vis-a-vis motions for summary judgment and directed verdict. *Bon Air Hotel, Inc. v. Time, Inc., supra* at 864. *See also Wasserman v. Time, Inc.*, 424 F.2d 920, 922 (D.C. Cir.), cert. denied, 398 U.S. 940 (1970) (Wright, J., concurring).

In the case at bar, every indulgence was allowed to the petitioner, including allowing amendments to the Complaint, and additional time to conduct further discovery and to submit final briefs. (R. 153) The record was fully developed and both sides had ample opportunity to submit affidavits, depositions, and legal memoranda in support of their respective positions. Unless the Court finds, on the basis of pre-trial affidavits, depositions or other documentary evidence, that the plaintiff can prove actual malice in the *Times* sense, it should grant summary judgment for the defendants. *Wasserman v. Time, Inc., supra* at 922 (Wright, J., concurring). Since important First Amendment considerations are involved in defamation actions such as the case at bar, summary judgment procedures are particularly appropriate. *See Bon Air Hotel, Inc. v. Time, Inc., supra*, and *Treutler v. Meredith Corp.*, 455 F.2d 255 (8th Cir. 1972).

Since the very pendency of a libel action may cut across the public interest in free and untrammeled speech on public issues, the public figure cannot resist a newspaper's motion for summary judgment under Rule 56 by arguing that there is an issue for the jury as to malice unless he makes some showing, of the kind contemplated by the Rules, of facts from which malice may be inferred. *Thompson v. Evening Star Newspaper Co., supra* at 776. Immaterial discrepancies appearing in affidavits and depositions will not defeat the movant's right to

summary judgment. The mere hope of plaintiff that somehow or other on cross-examination the credibility of a defense witness can be put in issue is not sufficient to resist a motion for summary judgment. *See Hurley v. Northwest Publications, Inc.*, 273 F. Supp. 967, 974 (D. Minn. 1967). The trial court in the instant case found no material discrepancies in the voluminous depositions and affidavits filed in this cause. (R. 144) The additional discovery conducted by petitioner attempting to uncover the basis for the changed recollection of Mr. Will T. Cheek in regard to his luncheon conversation with Mr. Morrell did nothing more than substantiate the respondent's position.

The Tennessee Supreme Court by its denial of certiorari, and the Tennessee Court of Appeals and the trial court found that none of petitioner's proofs considered either singly or cumulatively, satisfies the constitutional standard with the convincing clarity necessary to raise a jury question as to whether the alleged defamatory falsehoods were published with knowledge that they were false or with reckless disregard of whether they were false or not.

To aid the Court in its analysis of the voluminous record in this cause, respondent sets forth the following analysis of the relevant affidavits and depositions, first as they relate to the article published by the respondent on May 30, 1974 and second as they relate to the article published by the respondent on May 31, 1974.

A. Summary of relevant depositions and affidavits in regard to the article of May 30, 1974.

The affidavit of Ed Long (R. 29), the reporter who wrote the May 30th article, the affidavit of Kenneth Morrell (R. 27), editor of The Nashville Banner, and their respective depositions clearly show that this article was written after an extensive investigation by Mr. Long at Mr. Morrell's direction and that

respondent had no knowledge that any statements contained in the article were false and did not print the article with reckless disregard for whether the statements contained in the article were false or not. In point of fact, the respondent had reasonable grounds to believe that all the statements contained in the article were in fact true. Petitioner complained of the statements contained in the sixth paragraph of the article which is set out in Paragraph 2 of the Complaint herein. (R. 7) The Tennessee Court of Appeals correctly found that petitioner was an active candidate for the Democratic nomination to the Supreme Court of Tennessee, since petitioner admitted this in his statement of the case filed in that Court.

The affidavits and depositions submitted by petitioner in opposition to the motion for summary judgment are not addressed to the issue of "actual malice." The first affidavit of petitioner (R. 51) may be summarized by saying that petitioner *believes* that the articles were published by the respondent without a valid basis and as part of a conspiracy to defame him and to prevent his nomination as a Democratic candidate to the Tennessee Supreme Court. Petitioner therein denies that he ever discussed with anyone the possibility of working a deal with the liberal element of the Executive Committee whereby a slate would include Russell Sugarman as Attorney General and petitioner as a Democratic nominee for the Tennessee Supreme Court. Petitioner further *believes* that the stories were published by respondent out of spite or malice to defeat him and without an attempt to ascertain the truth of the statements contained in the story. Lastly, petitioner's affidavit states that petitioner *believes* that the articles were not written by the respective reporters but were the product of the editor of the respondent and emanated from a controversy between respondent's editor and petitioner which began more than twenty years ago.

The most that can be said of petitioner's first affidavit is that he disputes the accuracy of the respective articles and be-

lieves that they were motivated by a long-standing controversy with the present editor of the respondent. Petitioner's belief as to the motivation behind the articles is not admissible evidence, and does not raise a genuine issue as to any material fact on the issue of actual malice when compared with the detailed, factual testimony of Mr. Morrell, Mr. Long and the other affidavits and depositions submitted by the respondent in support of its motion for summary judgment.

During petitioner's efforts to gain the nomination of the Democratic party for a seat on the Tennessee Supreme Court, he states, in substance, in his second affidavit (R. 78) that he and Mr. Charles Wiles, a former foreman of the local grand jury and prominent businessman, met with Mr. Will Cheek, Secretary of the Tennessee State Democratic Executive Committee. At that meeting, Mr. Cheek, according to petitioner, indicated his belief that the petitioner would help the "ticket" by balancing the slate (between the liberal and conservative elements) and offered his support to the petitioner, which was later withdrawn.

The petitioner states in that affidavit that Mr. Cheek asked if he would be willing to be one of the nominees along with a black nominee, and that he indicated that he would. In that affidavit, petitioner further denies ever discussing with Mr. Cheek a "package deal" focusing on the State Attorney General position as being the pawn that could push him on to the ticket and he further denies discussing the working of a deal with the liberal element of the Executive Committee whereby Russell Sugarman would be made Attorney General if a slate was selected including him as a Democratic nominee for the Tennessee Supreme Court.

Mr. Ken Morrell, editor of The Nashville Banner, testified in regard to a conversation he had with Mr. Will Cheek some week to ten days prior to publication of the May 30th article.

(Morrell Dep. 2/19/76, p. 5, 6) During that conversation, Mr. Cheek informed him that petitioner was actively seeking support for his candidacy from some members of the Executive Committee, and that some maneuvering was going on involving Russell Sugarman being named Attorney General if petitioner was a nominee for the Tennessee Supreme Court. On the basis of that conversation, Mr. Morrell assigned reporter Ed Long the task of investigating and preparing an article concerning these matters. (R. 32) (Morrell Dep., 2/19/76, p. 8) During Mr. Long's investigation, Mr. Morrell discussed the matter with Mr. Long on several occasions (Morrell Dep., 2/19/76, p. 8), and Mr. Morrell approved the article prior to its publication. (Morrell Dep., 2/19/76, p. 9) In his affidavit, Mr. Morrell stated that he neither knew nor had reason to believe that any of the statements in the article were false. (R. 27)

Mr. Ed Long, the reporter who wrote the article published on May 30, 1974, by deposition and affidavit corroborated Mr. Morrell's testimony that the article was an assignment made pursuant to a conversation between Mr. Morrell and Mr. Cheek concerning some talk about maneuverings to get the judicial nomination. (Long Dep., p. 15) Ronald Borod, Senator William Peeler, Will Cheek, Gilbert S. Merritt, Jr., Senator Ed Gillock, and John Wade are quoted in the May 30th article written by Mr. Long.

During Mr. Long's investigation, he spoke with former Lieutenant Governor Frank Gorrell, who told him, based on information he had received from people holding office in the Democratic party, that there was a lot of "wheeling and dealing" going on and that he thought most of it was on behalf of the plaintiff. (Long Dep., p. 17, 18) Mr. Long stated that he subsequently discussed this matter with Mr. Will Cheek who verified and amplified the information he had received from Mr. Gorrell. (Long Dep., p. 19) Mr. Cheek supplied Mr. Long's in-

formation concerning the package deal coming out of West Tennessee focusing on the State Attorney General position as being the "pawn" that could push one candidate onto the ticket. (Long Dep., p. 29)

Mr. Long also interviewed Senator Ed Gillock, who indicated the situation was "very, very fluid." (Long Dep., p. 23) In his affidavit, Mr. Long stated that he exercised reasonable care in conducting his extensive investigation and interviews concerning the events depicted in the article, and stated that he neither knew nor had reason to believe that any of the statements made in the article were false. (R. 29)

Thus, the record indicates that Mr. Long conducted an extensive investigation and obtained information from Mr. Will Cheek, Secretary of the Democratic Party, Senator Ed Gillock, Mr. Ron Borod, Senator William Peeler, Mr. Gil Merritt, Jr., (now Circuit Judge for the United States Court of Appeals for the Sixth Circuit), former Lieutenant Governor Frank Gorrell, and Vanderbilt Law School Dean, John Wade, all of whom are identified in the article with the exception of Frank Gorrell.

The inconsistent depositions of Mr. Will Cheek indicate that he knew of rumors of attempted vote-swapping or dealing for votes (Cheek Dep., 1/14/75, p. 5); that the petitioner and others were involved in the rumors of vote dealing (Cheek Dep., 1/14/75, p. 10); that he and petitioner had specifically discussed a balancing deal between the left and right wing of the party (Cheek Dep., 1/14/75, p. 14); that he had discussed matters involving the Tennessee Supreme Court with Mr. Morrell some week to ten days prior to publication of the May 30, 1974 article (Cheek Dep., 4/1/76, p. 7, 8); that he had speculated about the possibility of the petitioner attempting to put together a ticket of liberals and conservatives wherein petitioner would be the only nominee from West Tennessee which by tradition would leave the office of Attorney General to be filled by

a nominee from West Tennessee; that he had a conversation in his office with Mr. Wiles and the petitioner (Cheek Dep., 4/1/76, p. 59); and that he had discussed with petitioner himself the concept of petitioner's running with a black from Memphis (Cheek Dep., 4/1/76, p. 54, 55). Thus, Mr. Cheek testified that he did indeed inform Mr. Ken Morrell, editor of The Nashville Banner, of the information quoted in Paragraph 2 of the Complaint (Cheek Dep., 4/1/76, pp. 7-8, 54). Mr. Cheek further testified that the idea of a "slate" which would involve petitioner and a black from Memphis was discussed with and approved by petitioner long before Mr. Cheek informed Ken Morrell of this possibility (Cheek Dep., 4/1/76, pp. 54, 57-61, 63). Thus, Mr. Cheek not only confirms Mr. Morrell's testimony as to the initial source of the story alleged by petitioner to be false and defamatory, he states further that it was in fact true.

Mr. Cheek further corroborated certain remarks which were attributed to him in the article; he acknowledged that the tone of the quotation, "I haven't seen a block vote or 'slate' happen yet and I don't think it will because of the inter-personal relationship among Committee members," was correct, and he indicated that he did say something to that effect (Cheek Dep., 1/14/75, p. 4) Similarly, he acknowledged that he made a statement to the effect that "Judges are aware that this type of dealing is illegal, not to mention unjudicial." (Cheek Dep., 1/14/75, p. 5)

In short, Mr. Cheek's testimony corroborates the remarks in the article attributed to him and further corroborates the language to which petitioner has objected and alleges to be defamatory.

The affidavit of State Senator Ed Gillock (R. 58) submitted by petitioner in opposition to respondent's motion for summary judgment can be summarized by stating that in Senator Gillock's

"mind" the stories are an example of irresponsible journalism and an effort to control Democratic nominations. Senator Gillock is "satisfied" that petitioner never attempted to make a deal regarding a slate involving Mr. Sugarman and he never heard of such a proposition. Senator Gillock's affidavit is basically his own opinion or his "mind" as to what is and what is not responsible journalism and his opinion regarding what petitioner may or may not have done. Nothing in Senator Gillock's affidavit presents admissible evidence or raises a genuine issue as to material fact with respect to actual malice. Senator Gillock is merely reported in the article of May 30, 1974, as having stated that "the situation is very, very fluid at this time and that is all I can say."

The affidavit of former Lieutenant Governor Frank Gorrell (R. 63) submitted by petitioner in opposition to respondent's motion for summary judgment simply states that he has no personal recollection of discussing the matter of nominations to the Tennessee Supreme Court with either Mr. Kenneth Morrell or Mr. Ed Long, but that such conversation would certainly not have been unusual. Mr. Gorrell's affidavit does not dispute the evidence submitted by respondent in support of its motion for summary judgment on the issue of actual malice.

The affidavit of Drue Smith (R. 62) of the Capitol Hill News Corps, simply states that she has no recollection of hearing any conversation involving Senator Ed Gillock. The affidavit of Dean John Wade, (R. 65) Professor of Law at Vanderbilt University and Chairman of the Judicial Selection Commission, indicated that he received a call from a reporter from The Nashville Banner prior to the publication of the May 30, 1974, article inquiring whether any combination among particular candidates to establish a slate was being discussed or considered. Dean Wade indicated that he had no personal knowledge of this matter, but that such might be taking place. He did not recall making the specific statements attributed to him in the

article, but indicated he did provide the reporter with words of similar import. Dean Wade's affidavit does not raise a genuine issue as to material fact on the issue of actual malice but tends to support the assertion of the writer of the article of May 30, 1974.

Mr. Russell Sugarman, a black Memphis attorney, whose deposition was submitted by petitioner in opposition to respondent's motion for summary judgment, stated that he was a member of the Tennessee State Democratic Executive Committee, and that he was not a candidate for the Supreme Court or any other position. (Sugarman Dep., pp. 4, 5) Mr. Sugarman indicated that he had no knowledge or information about a package deal coming out of West Tennessee focusing on the State Attorney General position as being the "pawn" that could push one candidate onto the ticket. (Sugarman Dep., p. 8) While he was aware that petitioner was actively seeking the nomination, he never had any knowledge that petitioner was involved in any deal until he heard about the article published by the respondent on May 30, 1974. (Sugarman Dep., pp. 8, 9)

Mr. Null Adams, the political editor of The Memphis Press Semitar, stated that he knew nothing whatsoever about this case. (Adams Dep., p. 10)

Mr. Gil Merritt, a Nashville attorney and now Circuit Judge of the United States Court of Appeals for the Sixth Circuit, stated that he did not recall any specific knowledge of discussions about a deal coming out of West Tennessee and he did not recall talking to Reporter Long about the article appearing on May 30, 1974, but indicated that he may have talked to someone about the contents of the article. (R. 135)

Former State Senator William Peeler, an attorney in Waverly, Tennessee, was attributed with having made several statements appearing in the article of May 30, 1974. Although Mr. Peeler

stated that he had no independent recollection of making the statements, he assumed that he had made them. (Peeler Dep., p. 4) Mr. Peeler's deposition in fact supports respondent's contention that these articles were published by the respondent without "actual malice."

Petitioner's second affidavit (R. 77) submitted in opposition to respondent's motion for summary judgment does not aid petitioner's cause on the issue of actual malice and grossly violates Rule 56.05 of the Tennessee Rules of Civil Procedure. Petitioner's second affidavit is not based upon personal knowledge as required by Rule 56.05, but asserts and relies on the truth of charges about which petitioner does not claim to know anything. *See Washington Post v. Keogh, supra* at 971. Furthermore, the petitioner's second affidavit does not set forth facts admissible in evidence as the allegations are almost all hearsay.

Thus, the record clearly reveals that the article published by respondent on May 30, 1974, was not published with "actual malice." Petitioner failed to introduce any proof whatsoever that respondent knew the statements contained in the article were false or that respondent printed the article with reckless disregard for whether statements contained in the article were false or not. None of the proof introduced by petitioner satisfies the constitutional standards with the convincing clarity necessary to raise a jury question on the issue of "actual malice."

B. Summary of relevant depositions and affidavits in regard to the article of May 31, 1974.

The following summaries relate to the article published by The Nashville Banner on May 31, 1974, involving the alleged bribe attempt on Committeewoman Helen Brown to obtain her vote for the petitioner.

Fate Thomas, Sheriff of Davidson County, testified in his deposition that he was contacted by petitioner's friend, Mr. Charles Wiles, who asked that he set up a meeting with Democratic Executive Committeewoman, Mrs. Helen Brown, and others for the purpose of promoting petitioner's candidacy for the Supreme Court. (Thomas Dep., p. 21) Sheriff Thomas then testified that he contacted Metro Councilman Mansfield Douglas and requested that he arrange an interview with Mrs. Brown on behalf of petitioner.

Metro Councilman Mansfield Douglas indicated in his deposition that at the request of Sheriff Thomas he asked Committeewoman Brown to talk with petitioner about his candidacy. (Douglas Dep., p. 11) Douglas indicated that he may have commented to Mrs. Brown that Sheriff Thomas had been of assistance to her in her race for Committeewoman and that he could be expected to assist her again (Douglas Dep., p. 12), but this was only to qualify his request for her to meet with the petitioner, and not with the intent of offering to bribe Mrs. Brown. (Douglas Dep., pp. 12, 14) Mr. Douglas stated that he did not ask her to support petitioner (Douglas Dep., p. 16) but simply to meet with petitioner as a matter of courtesy. (Douglas Dep., p. 12)

The deposition of Mrs. Helen Brown is a virtual parallel of what was printed by respondent in the article published on May 31, 1974. Mrs. Brown testified that she was contacted by telephone by Mary Harrison on May 23, 1974, just as the Banner reported it in the article. (Brown Dep., p. 6) Just as the article reported, Mrs. Brown testified that a meeting was scheduled between herself and Mary Harrison for May 28. (Brown Dep., p. 7) Mrs. Brown stated that both Andrew Gardner and Mary Harrison met with her to solicit her support for the nomination of petitioner to the Tennessee Supreme Court. (Brown Dep., p. 10)

On page 10 of her deposition, Mrs. Brown outlines the substance of her conversation with Andrew Gardner and Mary Harrison. Just as the Banner reported in its article, Mrs. Brown testified that Mr. Gardner solicited her vote for Mr. Taylor and specifically asked her "how much financing it would take to get her vote." (Brown Dep., p. 10) The basic facts outlined on page 10 of Mrs. Brown's deposition are virtually identical to the facts set forth in the article published by the respondent on May 31, 1974.

In the article published by the Banner, Mrs. Brown stated that the man (later determined to be Andrew Gardner) telephoned her the following Thursday and again identified himself and inquired as to whether she had changed her mind to support the petitioner. She replied that she had not decided how she would vote at that time. Mrs. Brown's testimony in her deposition corroborates this and she specifically testified that Mr. Gardner did call her again the following Thursday to solicit her support for petitioner. (Brown Dep., p. 18) As the article reported, she testified that she told Mr. Gardner when he called that she had not made up her mind about petitioner at that time. (Brown Dep., p. 18)

In the article published by the Banner Mrs. Brown is quoted as saying that her vote was not for sale, and in her deposition she likewise testified that she told Gardner her vote was not for sale. (Brown Dep., p. 10) Mrs. Brown stated that Mr. William Taylor, a friend who was sitting in an adjoining room at the time of the meeting, did not hear the bribery offer. (Brown Dep., p. 12)

She subsequently told Mr. Will Cheek of the attempted bribe, (Brown Dep., p. 15) and she contacted Gil Merritt to make a statement in order to protect herself. (Brown Dep., pp. 16, 21) Mr. Merritt and Mrs. Mary Shafner subsequently came to her home and the statement was prepared. (Brown Dep., p. 21)

On Friday morning, May 31, 1974, Mrs. Brown talked by phone to a reporter of The Nashville Banner, possibly Larry Brinton. (Brown Dep., p. 22) Mrs. Brown subsequently went to the District Attorney's Office where she was interviewed about the alleged bribe attempt. (Brown Dep., p. 26) She indicated that she remembered Mrs. Harrison's name, because she had written it down in her appointment book and that she recognized Mr. Gardner when she saw him at the courthouse. (Brown Dep., p. 27)

In marked contrast to the deposition of Mrs. Helen Brown are the depositions of Mary E. Harrison and Andrew Gardner. Throughout Mrs. Harrison's deposition she invoked the Fifth Amendment privilege against self-incrimination and refused to discuss any of the events which took place at the meeting among herself, Mr. Gardner and Mrs. Brown.

Mr. Gardner similarly invoked his Fifth Amendment privilege against self-incrimination throughout his deposition. At times, however, during Mr. Gardner's deposition, he did answer some of the questions posed to him by counsel. For example, Mr. Gardner was being probed by counsel as to whether he had discussed with Mrs. Helen Brown the necessity or the importance of knowing or having friends in the court, like the court officers. At first, Mr. Gardner denied that he had had such a discussion, but when pressed by counsel, he stated:

I told her (Mrs. Brown) if she would turn us a favor, and if we needed a favor we would help her we might.

(Gardner Dep., p. 41) This statement by Gardner constitutes an admission that he and Mrs. Harrison had offered Mrs. Helen Brown favors in return for her support for the petitioner.

Mr. William Taylor stated in his deposition that he was at Mrs. Brown's home when the alleged bribe attempt occurred. (William Taylor Dep., p. 4) He further testified that at one

point during the meeting with Mr. Gardner and Mrs. Harrison, Mrs. Brown came to him and asked, "Did you hear what they said? That man tried to offer me some money." (William Taylor Dep., p. 7) Mrs. Brown had told him that they were coming to talk to her about petitioner's candidacy for the Supreme Court. (William Taylor Dep., p. 5)

Mrs. Gena Carter, a member of the Judicial Selection Commission, stated in her deposition that prior to publication of the article, Mrs. Brown told her that two people had discussed petitioner's candidacy with her and inquired as to how she stood on his candidacy and that they in fact "offered to—wanted to buy her vote and that she told them her vote was not for sale." (Carter Dep., p. 6) When Mrs. Brown desired legal assistance, Mrs. Carter called Mary Shafner for assistance.

Mrs. Mary Shafner assisted Mr. Gil Merritt in his activities with the Judicial Selection Commission, and she stated in her deposition that on the evening of May 30, 1974, she accompanied Mr. Merritt to Mrs. Brown's home to take her statement. (Shafner Dep., p. 6) She indicated that she witnessed the statement given to Mr. Merritt by Mrs. Brown. (Shafner Dep., pp. 6, 7) She further stated that after taking the statement, she accompanied Mr. Merritt to the home of Democratic Chairman James Sasser (now United States Senator from Tennessee) to show him the statement. (Shafner Dep., p. 8)

Mr. Gil Merritt, counsel for the Judicial Selection Commission, and now Circuit Judge for the United States Court of Appeals for the Sixth Circuit, stated in his deposition that on May 30, 1974, Mrs. Shafner told him that Mrs. Brown had been approached, purportedly on behalf of petitioner, and offered money for her vote in favor of petitioner. (Merritt Dep., 1/14/75, p. 6) Mr. Merritt and Mrs. Shafner went to see Mrs. Brown, (Merritt Dep., 1/14/75, p. 7) obtained her statement, and took the statement to James Sasser that same evening. (Merritt Dep., 1/14/75, pp. 7, 8) He and James Sasser decided

to turn the statement over to the District Attorney the next morning. (Merritt Dep., 1/14/75, p. 9) Mr. Merritt could not recall giving any statement to the press in regard to the May 31, 1974 article. (Merritt Dep., 1/14/75, pp. 10, 11)

Mr. James Sasser was Chairman of the Tennessee State Democratic Executive Committee at the time of publication of the May 31, 1974 article. Mr. Sasser testified in his deposition that on the evening of May 30, 1974, Mr. Merritt and Mrs. Shafner came to his home with a statement obtained from Mrs. Brown, and that he and Mr. Merritt discussed the statement and decided to meet with Attorney General Thomas Shriver the following morning. (Sasser Dep., 1/14/75, pp. 6, 7) The following morning they went to General Shriver's office and presented the statement to him. (Sasser Dep., 1/14/75, p. 7) He subsequently spoke to Larry Brinton, reporter for the respondent, about this matter. (Sasser Dep., 1/14/76, p. 8)

District Attorney General Thomas Shriver's deposition lends further credence and support to the story told by Mrs. Brown during her deposition and as reported in The Nashville Banner. General Shriver relates in his deposition that Gil Merritt and James Sasser came to his office on the morning of May 31, 1974, and brought a signed statement taken by Mr. Merritt from Helen Brown concerning the facts of the alleged attempt by Mr. Gardner and Mrs. Harrison to buy her vote. (Shriver Dep., 1/14/75, p. 5) After a lengthy discussion, and after determining that Mrs. Brown was a credible witness and that the public had the right to know of the charges that had been made by Mrs. Brown, General Shriver called Ken Morrell, editor of The Nashville Banner. (Shriver Dep., 1/14/75, pp. 6, 7) Thereafter, Larry Brinton, a reporter for The Nashville Banner, called General Shriver back to check out the story which was published on May 31, 1974.

General Shriver testified that Helen Brown took and passed a polygraph examination concerning the events described in her

deposition and described in the article published by The Nashville Banner on May 31, 1974. (Shriver Dep., 1/14/75, p. 15) By contrast, General Shriver stated that Mr. Gardner would not take a polygraph examination concerning the events described by Mrs. Brown. (Shriver Dep., 1/14/75, p. 19) General Shriver further concluded that Mrs. Brown was telling the truth after studying the answers of her polygraph test. (Shriver Dep., 1/14/75, pp. 20, 21) In response to questioning by counsel for the petitioner, General Shriver stated that petitioner was a man who was desperate to get on the Supreme Court and also that he was a man who had an overpowering ambition to be on the Court. (Shriver Dep., 1/14/75, p. 9)

Reporter Larry Brinton, author of the May 31, 1974 article, stated that he conducted an extensive investigation of the events described in the article and had no reason to doubt the credibility of the people he interviewed or quoted in the article. (R. 31) His affidavit basically states that the article was published without actual malice and that he had no knowledge that any statements contained in the article were false and did not print the article with reckless disregard for whether statements contained in the article were false or not.

IV. The Tennessee Court of Appeals Correctly Held as a Matter of Law That the Article of May 31, 1974, Was Not Defamatory of Petitioner and Did Not Err in Not Reaching Any Conclusion on the Issue of Whether the Article of May 30, 1974, Was Defamatory of Petitioner.

Petitioner charged that both of the articles charged petitioner with the crime of bribery and were thus defamatory per se. Respondent submits that the trial court correctly decided as a matter of law that the clear and unambiguous language contained in both articles was not capable of being interpreted as defama-

tory toward petitioner. The statements claimed to be defamatory by petitioner when read in the sense that the readers to whom the article was addressed would understand it, simply does not amount to a charge of bribery (R. 152). No reader could have thought that the newspaper articles were charging petitioner with the commission of the criminal offense of bribery.

A publication claimed to be defamatory must be read and construed in the sense in which the readers to whom it is addressed would ordinarily understand it. So the whole item, including display lines, should be read and construed together, and its meaning and signification thus determined. When thus read, if its meaning is so unambiguous as to reasonably bear but one interpretation, it is for the judge to say whether that signification is defamatory or not. *Black v. Nashville Banner Pub. Co.*, 24 Tenn. App. 137, 141 S.W.2d 908, 913 (1940). Where the language complained of is clearly unambiguous, its meaning and character presents a question of law for the court. *See Brown v. Newman*, 224 Tenn. 197, 457 S.W.2d 120, 122 (1970) and *see also Williams v. McKee*, 98 Tenn. 139, 38 S.W. 730, 731 (1897).

Applying these principles, the Tennessee Court of Appeals examined the article of May 31, 1974, and noted that it was true that the article clearly and unambiguously reports charges of bribery. The Court of Appeals further correctly concluded that those charges were clearly not leveled at petitioner as the article stated that two people tried to buy a vote for petitioner, not that petitioner tried to buy a vote. The Tennessee Court of Appeals correctly concluded that the article certainly could not be construed as a defamation of petitioner.

In regard to the article published May 30, 1974, petitioner complained of specific language set forth in paragraph 2 of his complaint as follows:

Taylor is actively seeking the nomination, possibly by working a deal with the liberal element of the Executive

Committee whereby selection commission member Russell Sugarman, a black, would be Attorney General if a 'slate' is selected including Taylor.

Petitioner charged that the above statement amounted to a charge by respondent that petitioner had committed the crime of bribery under the Election Code. The Court of Appeals did not reach a conclusion as to whether or not the article of May 30 was defamatory of petitioner, since they found that there was no genuine issue as to material fact on the issue of actual malice and that the publication of the article was therefore constitutionally privileged. While respondent believes that the trial court correctly held that the language complained of by petitioner in the article of May 30, was clear and unambiguous, did not charge petitioner with the crime of bribery, and was not defamatory as to petitioner, the refusal of the Tennessee Court of Appeals to make a determination as to whether that article was defamatory of petitioner was not error, since the Tennessee Court of Appeals had already determined that the article was published without actual malice and was constitutionally privileged.

V. This Court Should Deny Certiorari Because the Tennessee Court of Appeals Did Not Weigh the Evidence or Judge the Credibility of Witnesses in Holding That There Was No Genuine Issue of Material Fact as to Actual Malice.

In reviewing the trial court's decision on respondent's Motion for Summary Judgment, the Tennessee Court of Appeals noted that the party moving for summary judgment has the burden of showing that no genuine issue of material fact exists and that the court must view the record in the light most favorable to the motion's opponent. The Court of Appeals observed that the only conflict in the evidence that was not arguably material was the inconsistency in the depositions of Will Cheek. This was the only evidence that could have been weighed

or evaluated on the basis of credibility. Petitioner argued that the inconsistent depositions of Will Cheek, when viewed in the light most favorable to petitioner, raised an issue of material fact as to actual malice.

The Tennessee Court of Appeals analyzed the inconsistent depositions of Will Cheek and viewed them in the light most favorable to petitioner. In Cheek's first deposition taken on January 14, 1975, he denied that he passed on to anyone the rumor that petitioner was involved in such maneuvering as the article reported and stated that he did not believe that petitioner was so involved. In Cheek's deposition taken on April 1, 1976, after his recollection had been refreshed, he testified that he had speculated about petitioner to Ken Morrell, respondent's editor, along the lines reported in the article. Cheek's second deposition was corroborated by the depositions of Ken Morrell and Ed Long.

The Tennessee Court of Appeals noted the rule in Tennessee that contradictory statements of a witness in connection with the same fact have the result of cancelling each other out. Unexplained conflicting statements of a witness nullify each other, and are entitled to no weight as evidence unless corroborated. *Nashville and American Trust Company v. Aetna Casualty and Surety Company*, 21 Tenn. App. 366, 110 S.W. 2d 1041, 1046 (1937). See also *Degrafenreid v. Nashville Ry. and Light Company*, 162 Tenn. 558, 39 S.W.2d 274 (1931), and *Johnston v. Cincinnati, N.O. & P.P. Ry. Co., et al.*, 146 Tenn. 135, 240 S.W. 429 (1922). The question here is not one of the credibility of a witness or of the weight of evidence; but it is whether there is any evidence at all to prove the fact. If two witnesses contradict each other, there is proof on both sides, and it is for the jury to say where the truth lies; but if the proof of a fact lies wholly with one witness, and he both affirms and denies it, and there is no explanation, it cannot stand otherwise than unproven. For his testimony to prove it is

no stronger than his testimony to disprove it, and it would be mere caprice in a jury upon such evidence to decide it either way. *Degrafenreid v. Nashville Ry. and Light Company, supra*, 39 S.W.2d at 275.

In the instant case, the Tennessee Court of Appeals noted that the inconsistency in Cheek's testimony was explained by his refreshed recollection. The Court of Appeals further noted that Cheek's testimony in his second deposition is corroborated by that of Morrell and Long, while the testimony of his first deposition is uncorroborated.

Even though the inconsistency in Cheek's testimony was explained and the testimony in his second deposition was corroborated, the Court of Appeals applied the above cited case law and disregarded the inconsistent testimony of Cheek, since this was to view the evidence in a light as favorable to petitioner as required by the summary judgment standard and perhaps more so. When the cancelling out rule was applied the court could look only to the testimony of Morrell and Long that Cheek related to respondent the substance of the story published by respondent about petitioner and the Attorney General "deal." With the only evidence indicating that the source of the story was the Secretary of the State Democratic Executive Committee, the Court of Appeals correctly concluded that there was no doubt that there was no genuine issue of material fact and that respondent published the May 30 article without actual malice.

VI. The Tennessee Court of Appeals Correctly Affirmed the Trial Court's Granting of Summary Judgment for Respondent on the Cause of Action for Intentional Interference With Prospective Advantage Sought to Be Pleaded by Petitioner by Way of Amendments to His Original Complaint.

By way of amendments to his original complaint petitioner sought to plead a tort which appears to be intentional interference with prospective advantage, or, more specifically, the tort of injurious falsehood which is merely a species of intentional interference with prospective advantage. The Tennessee Court of Appeals observed that petitioner presented no evidence to raise an issue of material fact on any of the elements of that tort in the instant case. Further, the Court of Appeals noted that petitioner cited no authority in support of that cause of action or even to show that such a tort is recognized in Tennessee. In addition, the Court of Appeals agreed with the trial court that the First Amendment not only protects respondent against a charge of libel in this case, but it also protects respondent against liability for this tort.

The constitutional privilege requiring plaintiffs to prove actual malice with convincing clarity is not confined to the tort of libel. In *Time, Inc. v. Hill*, 385 U.S. 374 (1967), this Court extended the constitutional privilege to include the tort of invasion of privacy. In general, it may be said that injurious falsehood, which is a tort that never has been greatly favored by the law, is subject to all of the privileges recognized both in cases of personal defamation and in those other types of interference with economic advantage. W. Prosser, *The Law of Torts*, 4th Ed., §128 (1971). No matter what legal garb petitioner sought to dress his complaint in, it was incumbent upon the petitioner to prove actual malice with convincing clarity and he completely failed to do this. The Court of Appeals thus correctly refused to remand the case back to the trial court for trial of the cause of action for intentional inter-

ference with prospective advantage, and correctly affirmed the trial court's granting of summary judgment to respondent on this cause of action.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

Robert L. Taylor,
Plaintiff-Appellant,
v.
Nashville Banner Publishing Company,
Defendant-Appellee.

} Davidson Law

Court of Appeals of Tennessee
Middle Section at Nashville

Appealed From the Second Circuit Court for Davidson County,
Tennessee, The Honorable Hal Hardin, Judge.

Filed: March 31, 1978

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torney for Defendant-Appellee.

Affirmed.

FRANK F. DROWOTA, III
Judge

OPINION

(Filed March 31, 1978)

This is an appeal by plaintiff, a public figure, from a summary
judgment dismissing with prejudice his libel suit against defend-
ant newspaper.

Plaintiff Robert L. Taylor is a well-known attorney, a former Chancellor, and a former judge of the western section of this Court. He once unsuccessfully sought the Democratic nomination for governor of Tennessee. In the spring of 1974, he was an active candidate for the Democratic nomination to the Supreme Court of Tennessee. Defendant Nashville Banner Publishing Company (Banner), one of two daily newspapers in Nashville, published two articles containing material allegedly defamatory of plaintiff on May 30 and May 31, 1974. The articles dealt with events surrounding the selection of Democratic candidates for the Supreme Court.

The Tennessee Supreme Court is composed of five judges, "of whom not more than two shall reside in any one of the grand divisions of the State." Tennessee Constitution Art. 6, § 2. Supreme Court judges are to be "elected by the qualified voters of the State" according to such rules as the legislature prescribes. Tennessee Constitution, Art. 6, § 3. Article 6, § 5 of the State Constitution provides that the judges of the Supreme Court shall appoint the Attorney General of the State. By tradition, the Attorney General is appointed from the one grand division, east, middle, or west, that is represented by only one Supreme Court judge.

At one time, judges of all the appellate courts of this State were chosen by means of a merit selection plan. This plan, set out in T.C.A. §§ 17-701-17-716, provides for the governor to fill judicial vacancies by appointing one person from a group of three recommended by the appellate court nominating commission, a body established by the statute. The appointee then appears on the next general election ballot to be accepted or rejected by the voters on a "yes/no" basis. While this system still applies to intermediate appellate courts, the legislature in 1974 excepted the Supreme Court judges from its operation. The result is that Supreme Court judges are selected in popu-

lar, contested elections much like holders of political offices in the executive and legislative branches of government.

In the spring of 1974, the State's political parties were anticipating the election of Supreme Court judges to be held in August of that year. The Tennessee State Democratic Executive Committee, which was to choose its party's five nominees for the Court, had scheduled a meeting in Nashville for that purpose for June 1, 1974. The Committee had received from a special Judicial Selection Commission the names of eight people recommended as qualified for the Court. Plaintiff Taylor's name was not one of the eight names submitted. The Executive Committee was not absolutely bound to choose its five nominees from among the eight recommended, however, and plaintiff remained an active candidate.

In the context of this political nominating process, the Banner published the first story of which plaintiff complains on May 30, 1974. The gist of the story was that a great deal of political maneuvering was occurring in Democratic ranks with respect to the Supreme Court nominations. In the part of the story particularly complained of by plaintiff, and alleged to be defamatory of him, it is stated that plaintiff was actively seeking the nomination, "possibly by working a deal with the liberal element of the executive committee whereby . . . Russell Sugarman, a black, would be made attorney general" if plaintiff were nominated to the Court. The entire article is reprinted in an appendix to this opinion, and is further discussed below.

On May 31, 1974, the day before the Executive Committee meeting, the Banner published the second article of which plaintiff now complains. The article told of bribery charges lodged with the District Attorney General in Nashville by a member of the Democratic Executive Committee. The Committee member, it was reported, "said an attempt was made this week to 'buy my vote' for Memphis Attorney, Robert

Taylor" by an unidentified man and woman. The article went on to describe in detail the attempted bribe, the Committee member's refusal, and her filing of a statement with District Attorney General Shriver, who was said to be investigating the matter. The entire article is reproduced in the appendix to this opinion.

At the June 1 meeting, the Executive Committee chose its five nominees from the list of eight recommended. Plaintiff was not one of the five chosen. All five Democratic candidates were successful in the August election, and they constitute our present Supreme Court.

On May 27, 1975, plaintiff brought the instant libel suit against the Banner in Davidson County Circuit Court, alleging that the articles of May 30 and 31, 1974, defamed him. Plaintiff claimed in his complaint that the articles injured his reputation and resulted in his failing to get enough Executive Committee votes for nomination. He asked \$500,000.00 in compensatory and punitive damages. The complaint was amended, in March of 1976, to allege that the articles were published "maliciously," that they were "calculated by the defendant to injure plaintiff's candidacy for nomination," and that they "did produce actual damages to the plaintiff by causing him to fail to secure enough votes."

Defendant Nashville Banner took the position that the constitutional privilege first established in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), applied, and that there was no evidence of "actual malice" as defined in that case. On October 8, 1975, defendant filed its motion for summary judgment. Two grounds for dismissal were asserted: (1) that the language complained of is unambiguous and not defamatory; and (2) that there is no genuine issue of material fact on the issue of actual malice. In support of its motion, defendant attached certain affidavits and depositions. The depositions were

ones taken early in 1975 in the case of *Taylor v. Tennessee State Democratic Executive Committee*, a suit brought by plaintiff in the Chancery Court for Shelby County. Because it perceived the case as a serious and unusual one, the trial court permitted the parties to engage in very extensive discovery over a long period of time before ruling on the summary judgment motion. Further discovery consisted in large part of new depositions, including fresh testimony from some of those whose depositions in the Chancery case had already been submitted.

On January 5, 1977, the trial court filed a lengthy memorandum opinion in which it sustained defendant's motion for summary judgment on all grounds as to both articles. The opinion contains an orderly and thorough presentation of the facts, and an accurate and extensive discussion of applicable law. It also embodies the court's conclusion that the articles in question are not defamatory of plaintiff, and that there is absolutely no evidence to indicate that plaintiff could prove that defendant published them with "actual malice" within the meaning of *New York Times Co. v. Sullivan, supra*. In accordance with this opinion, the court on January 7, 1977, entered an order granting defendant's motion for summary judgment and dismissing the case. Plaintiff has appealed.

Plaintiff has raised five assignments of error in this Court. In the first, plaintiff complains of the trial court's conclusion that the articles are not defamatory of him. In the second assignment he disputes the conclusion that there is no genuine issue of material fact on the question of actual malice. In the third assignment plaintiff alleges that the trial court erred in refusing to allow him to amend his complaint, while in the fourth he complains that the trial court improperly weighed the evidence and determined the credibility of the witnesses. In the fifth assignment of error plaintiff simply avers that the trial court erred in granting summary judgment. We will examine

the May 30 article in the light of the first two assignments of error, and then proceed to treat the May 31 article in the light of the same two assignments. Finally, we will examine plaintiff's third, fourth and fifth assignments of error.

Summary judgment is to be rendered by a trial court only when it is shown that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." T.R.C.P. 56.03. The summary judgment procedure is not to be regarded as a substitute for trial of disputed factual issues. *Evco Corp. v. Ross*, 528 S.W.2d 20 (Tenn. 1975); *Layhew v. Dixon*, 527 S.W.2d 739 (Tenn. 1975). The party who moves for summary judgment has the burden of showing that no genuine issue of material fact exists, and in ruling on the motion the court must view the record in the light most favorable to the motion's opponent. *Lucas Brothers v. Cudahy Co.*, 533 S.W.2d 313 (Tenn. App. 1975). With this standard in mind, we turn to the merits of plaintiff's appeal.

The Article of May 30, 1974

In his first assignment, plaintiff contends that the trial court erred in concluding that the article of May 30, 1974, is not defamatory of him. Plaintiff points especially to the sixth paragraph of the article. The first six paragraphs read as follows:

Intense political maneuvering that has been termed by one insider as "a hell of a lot of dealing" may determine the nominations for the State Supreme Court.

Jockeying, dealing and political pressure are all part of the picture as candidates are attempting to be selected by the State Democratic Executive Committee for the five slots on the ticket for the high court.

The 36 member committee meets here Saturday to narrow a list of eight candidates recommended by the Judicial Selection Commission to five nominees.

But there are some other persons with hats in the ring. And through these persons, deals are being discussed. A "package deal" coming out of West Tennessee focuses on the state attorney general position as being the pawn that could push one candidate onto the ticket.

Indications from Memphis are that former chancellor Robert L. Taylor is attempting to get enough votes to overthrow the recommendation of Justice William H. D. Fones.

Taylor is actively seeking the nomination possibly by working a deal with the liberal element of the executive committee whereby Judicial Selection Commission member Russell Sugarman, a black, would be made attorney general if a "slate" is selected including Taylor.

Plaintiff's primary argument is that the article charges him with a crime, which of course would make it clearly defamatory. Plaintiff alleges that the article charges him with the crime of bribery, citing T.C.A. §2-1927. It is doubtful, but arguable, that the conduct attributed to plaintiff by the article is proscribed by that statute.

Furthermore, although plaintiff has not raised the point, this Court recognizes that the May 30 article may easily be understood as charging that plaintiff was guilty of conduct contrary to accepted and published standards of conduct for candidates for judicial office. During May, 1974, the conduct of judges and candidates for judicial office was governed by Rule 38 of the Supreme Court of Tennessee, which then read in part as follows:

The ethical standards relating to the administration of the law in this Court, shall be the Canons of Judicial Ethics of the American Bar Association now in force, and as hereafter modified or supplemented.

Candidacy for judicial office was specifically governed by Canon 30 of the Canons of Judicial Ethics of the American Bar Association, which read in pertinent part:

A candidate for judicial position should not make or suffer others to make for him, promises of conduct in office which appeal to the cupidity or prejudices of the appointing or electing power . . . and he should do nothing while a candidate to create the impression that if chosen, he will administer his office with bias, partiality or improper discrimination.

It may be that the May 30 article in effect charges that plaintiff violated this ethical provision by promising to support and vote for Mr. Sugarman as Attorney General if plaintiff were nominated and elected to the Supreme Court. If so, this is a powerful argument in favor of the conclusion that the article is defamatory.

On the other hand, it could be argued that the article must be considered in the context of the politics surrounding major party nominations for high state office, a context clearly delineated in the article as a whole. It is not customary to consider judges and candidates for judicial office in the context of such partisan politics. The judicial function is to interpret and apply the law and to administer justice in a manner that is independent of all considerations save fairness and logic. It is primarily for this reason that the conduct of judges is restricted by many rules, such as the Canons of Judicial Ethics referred to above, which do not bind those in the legislative and executive branches, the function of whose members is to formulate into law and carry out the subjective wishes of the people who elect them. Nevertheless, partisan politics is the context in which candidates for the Supreme Court in 1974 were placed by the use of a "popular election" as the selection process for Supreme Court judges. In such a political context, the disgrace involved in the type of "dealing" attributed to

plaintiff in the May 30 article is arguably less than would otherwise be the case with a candidate for judicial office under the "merit" form of selection. This is particularly true when, as here, the alleged deal involved the selection of Attorney General, which is in the nature of an administrative rather than a judicial function of the Supreme Court.

Of the three members of this panel, Judge Todd feels strongly that the May 30 article is defamatory, primarily on the ground that the article in effect charges plaintiff with violating Canon 30, *supra*. Contrary to the statements in his separate concurring opinion, however, the other two members of this panel neither condone violations of the Code of Judicial Conduct nor would we be unwilling to condemn such violations in a proper case. In this case we simply feel that since the trial court's judgment in defendant's favor must be affirmed with regard to the May 30 article on the issue of actual malice, discussed next, it would serve no useful purpose to reach a conclusion on the issue of whether that article is defamatory. Accordingly, we pretermit any further discussion of the facts or law related to this issue.

Plaintiff's next argument is that the trial court erred in concluding that there exists no genuine issue of material fact on the question of whether defendant published the May 30 article with actual malice. We disagree. We hold that, due to the absence of competent evidence that the May 30 article was published with actual malice, defendant's publication of it is protected by constitutional privilege.

Constitutional privilege was first articulated in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), wherein the Court held that a plaintiff who was a public official could not recover for defamatory statements relating to his official conduct unless he could prove that they were published with "actual malice," defined as knowledge of the statements' falsity or reckless disregard for whether they are false or not. 376 U.S. at 279-80.

This rule, based on the First Amendment guarantees of free expression, was soon extended to apply to public figures who are not public employees in cases such as *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). The Court has defined "reckless disregard" as a "high degree of awareness of probable falsity." *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). In this regard, the Court has also stated that

[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.

St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

In the instant case, plaintiff does not deny that he is a public figure for purposes of the *New York Times* doctrine. Rather, he argues that the inconsistent depositions of Will Cheek, when viewed in the light most favorable to him, raise an issue of material fact as to actual malice.

It was the testimony of both Ken Morrell, defendant's editor, and Ed Long, its reporter, that Will Cheek, the Secretary of the State Democratic Executive Committee, was the only source for the May 30 article's connection of plaintiff with a "deal" involving the office of Attorney General. The record contains two depositions of Cheek's, one taken on January 14, 1975, and the other on April 1, 1976. In the first deposition, Cheek categorically denied that he passed on to anyone a rumor that plaintiff was involved in such maneuvering as the article reported, stating that he did not believe that plaintiff was so involved. In the second deposition, taken more than a year later but after discussions with several people had allegedly refreshed Cheek's recollection, Cheek testified that he had "speculated" about plaintiff to Ken Morrell, defendant's editor, along the lines reported in the article.

Plaintiff would have us allow for the possibility that a jury might believe only the statements in Cheek's first deposition to

the effect that he never told defendant that plaintiff was involved in a "deal." Believing that, plaintiff argues, a jury could then disregard the additional testimony of Morrell and Long and conclude that defendant had no source at all for the May 30 article. On this conclusion, says plaintiff, a finding of actual malice might be predicated. This position, however, overlooks legal authority of long standing in Tennessee.

It is a rule of law in this state that contradictory statements of a witness in connection with the same fact have the result of "cancelling each other out." *DeGrafenreid v. Nash. Ry. & Lt. Co.*, 162 Tenn. 558, 39 S.W.2d 274 (1931); *Johnson v. Cincinnati N. O. & T. P. Ry. Co.*, 146 Tenn. 135, 240 S.W. 429 (1922); *Donaho v. Large*, 25 Tenn. App. 433, 158 S.W.2d 447 (1941); *Southern Motors, Inc. v. Morton*, 25 Tenn. App. 204, 154 S.W.2d 801 (1941); *Nashville & American Trust Co. v. Aetna Cas. & Sur. Co.*, 21 Tenn. App. 366, 110 S.W.2d 1041 (1937).

The question here is not one of the credibility of a witness or of the weight of evidence; but it is whether there is any evidence at all to prove the fact. If two witnesses contradict each other, there is proof on both sides, and it is for the jury to say where the truth lies; but if the proof of a fact lies wholly with one witness, and he both affirms and denies it, and there is no explanation, it cannot stand otherwise than unproven. For his testimony to prove it is no stronger than his testimony to disprove it, and it would be mere caprice in a jury upon such evidence to decide it either way.

Johnson, supra, 146 Tenn. at 158, 240 S.W. at 436. As can be seen from the quoted paragraph, this rule of "cancellation" is usually stated as applying only when the inconsistency in the witness's testimony is unexplained and when neither version of his testimony is corroborated by other evidence. In the instant case, the inconsistency in Cheek's testimony is explained by his

refreshed recollection. The testimony in his second deposition is corroborated by that of Morrell and Long, while the testimony of his first deposition is uncorroborated. Thus, there exist both explanation and corroboration, but both point in favor of the veracity of Cheek's second deposition, the existence of a reasonable source for the article, and the absence of an issue of material fact with regard to actual malice.

Under these circumstances, a jury could not be permitted to credit the first deposition of Cheek to the exclusion of all the evidence conflicting with it. To apply the rule of *Johnson, supra*, and disregard the inconsistent testimony of Cheek *in toto* is to view the evidence in a light as favorable to plaintiff as the summary judgment standard requires, and perhaps more so. Disregarding Cheek's inconsistent testimony, we are left with the testimony of Morrell and Long that Cheek related to defendant the substance of the story it published about plaintiff and the Attorney General "deal." With the only evidence indicating that the source of the story was the Secretary of the State Democratic Executive Committee, there is no doubt that there exists no genuine issue of material fact as to whether defendant published the May 30 article with knowledge of its falsity or with such reckless disregard for its truth or falsity as to constitute actual malice.

Since a proper view of the evidence reveals no support for the proposition that defendant published the May 30 article with actual malice, it follows that the trial court was correct in granting summary judgment in defendant's favor with regard to the libel claim based on that article.

The Article of May 31, 1974

Rather than reporting possible political "deals" connected with the Democratic nominations for the Supreme Court, the May 31 article discusses the much more serious matter of brib-

ery. The thrust of the article, reproduced in its entirety in the appendix to this opinion, appears in its initial paragraph:

A member of the State Democratic Executive Committee today said an attempt was made this week to "buy my vote" for Memphis Attorney Robert Taylor in Saturday's committee election for State Supreme Court nominees.

The article goes on to report that the Committee member was approached by two people who offered her "financing" if she would vote for plaintiff, and that she had informed the District Attorney General, who was investigating.

Again, plaintiff's first argument is that the trial court was wrong to conclude that this article is not defamatory. We cannot agree with plaintiff. It is true that the article clearly and unambiguously reports charges of bribery. But, just as clearly, those charges are not levelled at plaintiff. The article says that two people tried to buy a vote *for* plaintiff, not that plaintiff tried to buy a vote. In the context of the article, which nowhere even intimates a connection between plaintiff and the two unnamed persons who attempted the bribe, the quoted paragraph can only mean that a vote in favor of plaintiff was attempted to be bought, not that plaintiff was behind the attempt. This certainly cannot be construed as a defamation of plaintiff.

Moreover, defendant is clearly protected by constitutional privilege here. Again, plaintiff does not deny that he is a public figure for purposes of the *New York Times* doctrine. The trial court found that there was no issue of material fact on the question of actual malice, and we agree.

There is no question that a member of the Executive Committee went to District Attorney General Shriver with allegations of attempted bribery against two people, as the May 31 article reported. The record shows that defendant obtained

information about these charges from Shriver himself. The existence of the allegations and the investigation is clearly documented. It is equally clear that the gist of the allegations made to Shriver was that someone had attempted to pay a member of the Committee to vote in favor of plaintiff's nomination. Indeed, the evidence unequivocally supports not only the proposition that the published report of the allegations was true, but also the proposition that the allegations themselves were entirely true. Thus, defendant might well be entitled to an absolute defense at common law because of the truth of the matter published. At the very least, the substantial veracity of the May 31 article combined with the highly credible nature of its main source, the District Attorney General, supports the trial court's conclusion that, as a matter of law, plaintiff could not prove "actual malice" in the sense of *New York Times* and its progeny.

We hold that defendant's publication of the May 31 article was constitutionally protected as a matter of law because of the absence of any issue of material fact with respect to actual malice. The trial court's grant of summary judgment was correct, and must be affirmed on this basis. Our conclusion renders it unnecessary for us to consider plaintiff's rather lengthy arguments on other matters, such as the applicability of the non-constitutional privilege to publish comments on official proceedings.

Assignment of Error III

Plaintiff contends that the trial court erred in refusing to allow him to amend his complaint. The record shows that plaintiff did amend his complaint once by leave of court in March 1976, as we have noted above. The subject of this assignment of error, however, is a motion which plaintiff filed November 5, 1976, and which simply says, "The plaintiff Robert L. Taylor moves for leave to amend his complaint in

this case." The substance of the proposed amendment is not attached, nor does it appear in the record at all until the very end, where it is attached to plaintiff's petition to rehear. Nowhere in the record is there a ruling of the trial court on the motion. The transcript of a hearing held on another motion on November 12, 1976, contains reference to a motion to amend by plaintiff, but again the substance is lacking and no ruling appears.

In these circumstances, it would be impossible for this Court to reverse the trial court for failing to allow the amendment, even if it were clear that the court did fail to do so. Unless the record before us shows the substance of a proposed amendment and that it was filed in the trial court, we cannot determine what was before that court or whether the court acted properly on the motion to amend. The proper way to request the court for leave to amend under Rule 15 is to attach a copy of the proposed amendment to the motion so that it becomes part of the record at that time, regardless of what action the trial court takes or fails to take on it. This procedure ensures that the appellate courts know exactly what amendment the trial court was asked to allow. It is only with such knowledge that the trial court's decision can be reviewed.

Even assuming that the amendment appearing in plaintiff's motion to rehear was before the trial court as plaintiff contends, however, plaintiff has not been prejudiced in regard to it. First, while the trial court never expressly ruled on the motion to amend, the memorandum opinion indicates that the amendment was not denied but was considered by the court. The memorandum states that "[e]very indulgence has been allowed the plaintiff, including amendments to the complaint. . . ." (emphasis added). Since only one amendment, which was allowed, appears in the record, the inference is that the trial court considered that plaintiff's second motion to amend had been granted.

In addition, plaintiff would not have been unfairly prejudiced even had his second motion to amend been denied. The material factual allegations of the second amendment, as it appears in the petition to rehear, were already at issue. In the final paragraph of the proposed amendment, it is stated that defendant intentionally made false statements knowing they would injure plaintiff's chances of being nominated, and that the statements did result in his failure to be nominated. This can be construed, at most, as an attempt to plead a cause of action in the nature of intentional interference with prospective advantage. This is the same construction that was placed on plaintiff's first amendment by defendant's amended motion for summary judgment, and the trial court expressly rejected such a cause of action in its memorandum opinion. Since the substance of plaintiff's proposed second amendment to his complaint was pleaded and considered, his case could not have suffered from denial of his second motion to amend had the trial court denied it.

At this point, we note our agreement with the trial court's grant of summary judgment in defendant's favor on the cause of action for intentional interference with prospective advantage. Plaintiff has presented no evidence to raise an issue of material fact on any of the elements of that tort in the instant case. See Prosser, *supra*, § 310. He has cited no authority in support of this cause of action, nor even any to show that such a tort is recognized in Tennessee. Further, insofar as we have held that the First Amendment protects defendant against a charge of libel in this case, it would also protect defendant against liability for this tort. Summary judgment was properly granted on this cause of action.

Assignment of Error IV

In this assignment, plaintiff contends that the trial court weighed the evidence and determined the credibility of wit-

nesses, neither of which may properly be done in considering a motion for summary judgment. The only conflict in the evidence that is even arguably material, and the only evidence that could have been weighed or evaluated on the basis of credibility is the inconsistencies in the two depositions of Will Cheek. These inconsistencies involves what Cheek, one of the sources for the May 30 article, told the Banner in connection with that article. We have already decided, however, that the most favorable view to plaintiff that we could possibly take of Cheek's inconsistent testimony is to disregard it altogether. This decision, fully explained above in our discussion of the issue of actual malice in the publication of the May 30 article, means that it is irrelevant whether or not the trial court weighed Cheek's inconsistent evidence on the issue of actual malice in the publication of that article. In no other instance could the trial court have weighed evidence or gauged credibility, for in no other instance was there any material evidentiary inconsistency capable of being so resolved. We hold that the trial court followed proper summary judgment procedure on all issues which have been discussed, and on which its decisions have been affirmed, in this opinion.

Assignment of Error V

Finally, plaintiff alleges that the trial court erred in granting defendant's motion for summary judgment and dismissing the case. For the reason stated in this opinion we disagree, and affirm the judgment of the trial court.

Affirmed.

/s/ FRANK F. DROWOTA, III,
Judge

Todd, J., concurs in a separate opinion.

Blackburn, Sp. J., concurs.

APPENDIX A

May 30, 1974 Nashville Banner Article

INTENSE DEALING COULD INFLUENCE COURT PICKS

By Ed Long

Intense political maneuvering that has been termed by one insider as "a hell of a lot of dealing" may determine the nominations for the State Supreme Court.

Jockeying, dealing and political pressure are all part of the picture as candidates are attempting to be selected by the State Democratic Executive Committee for the five slots on the ticket for the high court.

The 36 member committee meets here Saturday to narrow a list of eight candidates recommended by the Judicial Selection Commission to five nominees.

But there are some other persons with hats in the ring. And through these persons, deals are being discussed. A "package deal" coming out of West Tennessee focuses on the state attorney general position as being the pawn that could push one candidate onto the ticket.

Indications from Memphis are that former chancellor Robert L. Taylor is attempting to get enough votes to overthrow the recommendation of Justice William H. D. Fones.

Taylor is actively seeking the nomination possibly by working a deal with the liberal element of the executive committee whereby Judicial Selection Commission member Russell Sugarman, a black, would be made attorney general if a "slate" is selected including Taylor.

East Tennessee has for years been the division with only one justice and the attorney general. The Supreme Court selects the attorney general.

The committee is composed of 18 men and 18 women. It is reported that Nashville lawyer Bonnie Cowan is seeking to get the support of the women of the committee.

Three of those recommended by the Selection Commission obviously will not be nominated, but it may be because they have been "cut out" of a deal.

State Sen. Ed Gillock of Memphis, who appeared before the commission as a candidate for the high court and was not recommended, reportedly said there is such a deal being made among committee members.

Gillock said that he is running for the Supreme Court nomination. He is busy contacting committee members to attempt to get their votes. "The situation is very, very fluid at this time and that's all I can say," the senator said.

One member, Ronald Borod, was targeted as the force behind Fones.

A Memphis lawyer and member of the committee, he said today, "I'm not interested in any deals or trading. I'm a supporter of Justice Fones and I'm interested in the other four seats.

"I'm not part of any move and I don't know about such a move."

Borod is a former law partner of Fones. He said that the justice is "trying to meet personally with the committee members."

Choose Slate

Sen. William Peeler, Waverly, said, "I think there's going to be an effort made to choose a date (sic) of candidates the panel selected.

"There will also be some candidates that will run who were not recommended by the commission. I would expect Bob Taylor would run regardless of what the commission did."

About the possibility of a deal between the candidates to also place a sixth person into consideration who would be named attorney general if a "package" was selected, Peeler said, "There's been some discussion along those lines. I don't know how serious the discussions have been."

The veteran lawmaker indicated that the candidates may be more interested in securing their own nominations than in selecting the attorney general.

Will Cheek of Nashville, secretary of the committee, said, "I haven't seen a block vote or 'slate' happen yet and I don't think it will because of the interpersonal relationship among committee members." He did say that all of the candidates had called him and sent letters to him as well as other members.

"Judges are aware that this type of dealing is illegal, not to mention unjudicial," Cheek said.

Method of Balloting

Gilbert S. Merritt, Jr., the legal counsel for the Judicial selection commission, and Cheek both said that the problem the committee will face Saturday will be in the method of balloting.

The committee will choose a nominee from each of the state's three grand divisions and two at-large candidates.

Merritt indicated that the order in which the candidates are chosen could be extremely important.

Two of the nominees said earlier this week that the important question will be the number of nominees from East Tennessee, which has traditionally only been represented by one justice. With three candidates, it may be that that section of the state will receive two justices in this election.

With only two candidates from West Tennessee, some observers have said that either Fones or Chief Justice Dyer will be dropped from the ticket if a "deal" is consummated.

The chairman of the Judicial Selection Commission, former Vanderbilt Law School Dean John Wade, said today, "I gather there has been some discussion" about the voting Saturday.

"It is not impossible for the candidates to get together but the members of the State Executive Committee would react adversely," Wade said.

In addition to Fones, Dyer and Cowan, those being considered are Nashville lawyer William Harbison, Chattanooga Chancellor Ray Brock, Pulaski lawyer Joe Henry, and Courts of Appeals Judges Charles O'Brien of Crossville and Robert Cooper of Knoxville.

May 31, 1974 Nashville Banner Article

Democratic Committeewoman Tells of Attempt To Influence High Court Vote

SHRIVER PROBING BRIBE TRY

By LARRY BRINTON

A member of the State Democratic Executive Committee today said an attempt was made this week to "buy my vote" for Memphis Attorney Robert Taylor in Saturday's committee election for State Supreme Court nominees.

The charge was leveled by Mrs. Helen A. Brown, of 1811 Beech Ave., and a detailed probe has been launched into the allegation by the staff of Dist. Atty. Gen. Thomas Shriver.

The State Democratic Executive Committee member said the alleged bribe attempt was made Tuesday at her home by a man and woman, whose names she could not recall, but could identify.

"How much financing would it take to get your vote," Mrs. Brown said the man asked after she told him she had not made up her mind as to whom she would vote for Saturday and he allegedly had suggested she vote for Taylor as one of five Democratic nominees.

"My vote is not for sale," the woman said she replied. Mrs. Brown said the answer "irritated" the woman, about 55 years old, who had originally telephoned her on May 23.

Election to Continue

James Sasser, chairman of the State Democratic Executive Committee, said the election will continue Saturday as planned.

"We plan to continue our meeting as planned and to nominate our Supreme Court justices," Sasser explained "I think this sort of attempt to influence voters is reprehensible and shocking, and I think Mrs. Brown is to be congratulated for coming forward."

The committee chairman said the nominees must be certified before the June 6 Democratic Primary election and the election must be held Saturday as planned.

Meantime, Shriver said his investigators began the probe this morning.

"We can't anticipate how long the investigation is going to take, but I doubt seriously it will be completed by Saturday," he commented.

The district attorney said he believed his investigators had learned the identity of the woman and expect to learn from her the man's identity.

Taylor could not be reached for comment. His Memphis law firm reported he was in Nashville for the weekend.

First Contact May 23

Mrs. Brown, serving her first term on the executive committee, said the woman had first contacted her by telephone May 23 stating she wanted to discuss the Davidson County Democratic Executive Committee with her.

"She said she wanted to talk to me about the election of a chairman for the county election committee and she said she also wanted to feel me out on some of the candidates that are coming up for the court nomination," Mrs. Brown told the Banner.

After discussing politics for a few minutes on the telephone, Mrs. Brown said it was agreed that the woman, who identified herself to the committeewoman, would visit Mrs. Brown said, referring to the continue the conversation.

"She came Tuesday, but she didn't say she was going to have anyone with her," Mrs. Brown said, referring to the man who told her he worked at the Metro Courthouse.

"She introduced herself, but I'm not very good on names," she commented. "He introduced himself, also."

"W talked about the county executive committee and she said she didn't like the way things were being run, that people were telling you how to vote and who to vote for," Mrs. Brown recalled.

"I said that politics is kind of dirty and gets nasty sometimes," she added. It was then, Mrs. Brown said, that the unidentified man began naming some of the nominees for the justice posts on the State Supreme Court.

"They asked me who I was in favor of," she said. "I said nobody in particular right now and that my mind was not really made up since I had until Saturday morning to reach a conclusion.

"This man spoke up and said 'how do you feel about Taylor? I feel like he's the man for the job.'"

Taylor Discussed

Mrs. Brown said she told the couple that she didn't favor Taylor over any of the other candidates.

"He said Taylor had done so much for the blacks in the Civil Rights movement." The committee member said they then discussed Taylor's role as chairman of Alabama Gov. George Wallace's Tennessee presidential campaign bid.

"That's when he asked me 'How much financing would it take to get your vote,' Mrs. Brown stated. After stating she wouldn't sell her vote, she said the man said, "I don't want to pressure you, but I wish you would think about it."

After turning down the alleged bribe attempt, Mrs. Brown said, the man "sort of smiled and tried to approach me at a different angle, but the woman called me 'hard-headed' and 'stubborn'."

Mrs. Brown said the man telephoned her Thursday, again identified himself, and inquired if she had changed her mind. The woman said she answered that she still had not decided how she would vote Saturday.

Mrs. Brown later contacted her attorney, Gilbert Merritt, who took a statement from her and turned it over to Shriver.

Taylor was one of a flock of Democrats who sought recommendation to the State Supreme Court by a special commission named by the Democratic Executive Committee.

The commission recommended eight persons, from which the executive committee can nominate five. Taylor was not one of the eight, but he still hopes to be one of the five nominees.

In its meeting Saturday, the executive committee is under no obligation to choose from the eight people recommended by the special commission.

Committee members privately have confided that the political infighting and dealing for the five posts have been fierce

SEPARATE CONCURRING OPINION

Although the majority opinion mentions my views on the impropriety of the actions alleged in the May 30, 1974, article, I am disappointed that my colleagues are unwilling to join me in unequivocally condemning actions prohibited by the prescribed ethical standards for the bench and bar.

The Code of Professional Responsibility adopted by the American Bar Association and by the Supreme Court of this State prior to May, 1974, provides:

"D.R. 8-103, *Lawyer Candidate for Political Office*. A lawyer who is a candidate for judicial office shall comply with the applicable provisions of Canon 7 of the Code of Judicial Conduct."

The Code of Judicial Conduct promulgated by the American Bar Association states:

"B. Campaign Conduct.

(1) A candidate . . . for judicial office . . ."

. . .
. . .

(c) should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of his office."

The article of May 30, 1974, charged plaintiff with violating the provisions just quoted.

The import of the article was not merely that plaintiff offered a promise of "support" for a candidate for Attorney General. Due to the fact that the Attorney General was to be elected by the members of the Supreme Court, the promise of "support" by necessary inference included the promise of the *vote* of plaintiff as a sitting justice of the Supreme Court.

I cannot agree that the violation of the quoted provision of the Code of Judicial Conduct is permissible activity for a judicial candidate "in the context of the politics surrounding major party nominations." Such conduct is prohibited, wrong, and disgraceful. It is proper grounds for discipline of a lawyer and removal of a judge for misconduct. This Court should not condone it as permissible.

Such conduct being as previously characterized, the imputation of such conduct is of necessity libelous.

I challenge this Court and the Supreme Court to declare in ringing and decisive tones that, regardless of the method of selecting judges, the prescribed standards of professional and judicial conduct are mandatory at all times and that there is no holiday from them during an election season.

Nevertheless, I am willing to accept the conclusion of the majority regarding the article of May 30, 1974, on the ground that the record fails to disclose any grounds of malice, knowledge of falsity, or reckless disregard of truth.

As to the May 31, 1974, article, I concur fully with the majority opinion.

/s/ Henry F. Todd,
Judge

OPINION ON PETITION TO REHEAR

(Filed May 16, 1978)

Plaintiff Taylor has filed a brief petition to rehear in which he asks how this Court can ignore the first deposition of Will Cheek and "import absolute verity" to the second. We think it clear from the principal opinion, however, that we did not view Cheek's depositions in this way. Rather, we assumed that his inconsistent statements had the effect of "canceling each other out," which left us with the testimony of Morrell and Long that Cheek was their source for the disputed statement in the article of May 30, 1974. Our approach to this issue has been fully explained in the principal opinion and will not be further recapitulated here.

The petition to rehear is respectfully denied.

/s/ Frank F. Drowota, III
Judge

Todd, J., concurs.

Blackburn, Sp. J., concurs.

APPENDIX B

In the Supreme Court of Tennessee
at Nashville

Robert L. Taylor,
Petitioner,
vs.
Nashville Banner Publishing Company,
Respondent.

Davidson Law.

ORDER

(Filed November 6, 1978)

On considering the petition for certiorari and briefs filed in this case and the entire record, the petition of Robert L. Taylor is denied at cost of the petitioner.

PER CURIAM

Not Participating:

Fones, J.